No. 97-92 (2)

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD P. IEYOUB, in his official capacity as Attorney General of the State of Louisiana; M. J. "MIKE" FOSTER, JR., in his official capacity as Governor of the State of Louisiana; ROBBY P. JINDAL, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals; and MADLYN B. BAGNERIS, in her official capacity as Secretary of the Louisiana Department of Social Services,

Petitioners,

—v.—

CAUSEWAY MEDICAL SUITE and HOPE MEDICAL GROUP FOR WOMEN, on behalf of themselves and the patients they serve,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the 1995 amendments to Louisiana's parental consent abortion law violate the right to privacy of all minors (including mature minors) by requiring a bypass court to notify and consult with both parents of an immature minor if the court finds parental notification to be in her best interest?

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Respondents Causeway Medical Suite and Hope Medical Group for Women, on behalf of themselves and the patients they serve, respectfully submit the following brief in opposition to the petition for certiorari filed by Richard F. Ieyoub, the Attorney General of Louisiana, *et al.*, docketed on July 17, 1997.

OPINIONS BELOW

The opinion of the district court is reported at 905 F. Supp. 360 (E.D. La. 1995). The opinion of the court of appeals is reported at 109 F.3d 1096 (5th Cir. 1997).

COUNTERSTATEMENT OF THE CASE

This suit challenges the constitutionality of certain amendments to Louisiana's statutory requirement that a minor seeking an abortion obtain the prior consent of her parent or guardian. La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1996) ("Louisiana's parental consent law"). The decision of the district court concisely sets forth the following legislative background of that law:

> LSA-R.S. 40:1299.35.5 is a Louisiana statute that regulates the circumstances under which a woman under the age of 18 can obtain an abortion in the State of Louisiana. Under LSA-R.S. 40:1299.35.5, a physician is prohibited from performing an abortion on a minor without either the consent of one parent or guardian, or an order from a juvenile court judge allowing the abortion. The process for obtaining a court order in lieu of parental consent is called a judicial bypass.
>
> The instant dispute centers on the 1995 amendments to the judicial bypass provision. Prior to the 1995 amendments, the judicial bypass provision stated:
>
> (4) If the court finds that the minor is sufficiently mature and well enough informed to make a decision

concerning the abortion on her own, the court *shall* issue an order authorizing the minor to act on the matter without parental consultation or consent.

(5) If the court finds that the minor is not competent to make a decision concerning the abortion on her own, but finds that the abortion nevertheless would be in the best interest of the minor, the court *shall* issue an order authorizing the abortion.

LSA-R.S. 40:1299.35.5 (A) and (B)(4)-(5) (1994) (emphasis added).

The judicial bypass provision of [Louisiana's parental consent law] had been in effect as written above for more than ten years. The prior version of the Louisiana parental consent law was upheld by this Court in the case of *Margaret S. v. Treen*, 597 F. Supp. 636, 650-52 (E.D. La. 1984), *aff'd on other grounds sub nom. Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986).

The 1995 amendments to the Louisiana parental consent law change the judicial bypass provision so that it reads as follows:

(4) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court *may* issue an order authorizing the minor to act on the matter. Prior to any such order, the court may require the minor to participate in an evaluation and counseling session with a mental health professional

. . .

(5) If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court *shall* decide whether or not it would be in the best interest

> of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor's best interest to notify her parents or guardian, the court *shall* so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.
>
> (6) If the court finds that the minor is not competent to make the decision concerning the abortion or that it would not be in the minor's best interest to notify her parents or guardian, the court *may* issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion would be in the best interests of the minor.

80a-82a (emphasis in original).[1]

On July 6, 1995, respondents filed this constitutional challenge to the 1995 Amendments to Louisiana's parental consent law, Act 1254 (1995 Amendments). The district court granted summary judgment in respondents' favor, permanently enjoining enforcement of the 1995 Amendments. The district court held that, as amended, Louisiana's parental consent law did not meet the requirements of *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality) (*Bellotti II*), and therefore imposed an undue burden on the right of minors to have access to abortion services. 92a.[2]

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[1] Citations to the petition are in the form "Pet. __"; citations to its appendix are in the form "___a".

[2] Specifically, the district court held that the 1995 Amendments: (1) impermissibly granted discretion to state court judges to ignore the maturity and/or best interest of a minor and deny her bypass application, 87a-89a; (2) impermissibly failed to provide sufficient expedition because the bypass procedure had no time limit on when the juvenile court must decide the application and when a referral for evaluation and counseling

The Court of Appeals for the Fifth Circuit affirmed the district court's ruling, holding that the 1995 Amendments presented three constitutional infirmities: (1) the changes from "shall" to "may" impermissibly delegated to juvenile court judges the authority to decide whether to order an abortion for a mature, well-informed minor or for a minor for whom an abortion is in her best interest, 21a-30a; (2) the removal of a specific time for deciding upon a minor's application and for the completion of counseling and evaluation left the consent statute inadequate to meet *Bellotti II*'s expediency requirements, 30a-34a; and (3) the parental notification provision contained in La. Rev. Stat. Ann. § 40:1299.35.5(B)(5) ("parental notification provision") improperly permitted juvenile court judges to notify the parent or guardian of an "immature" minor of the proceedings before it and to consult with those adults as part of the judge's process of deciding upon the minor's application, 34a-37a.

With respect to the parental notification provision, the court of appeals held:

> If *Bellotti II* means anything, it surely means that States seeking to regulate minors' access to abortion must offer a credible bypass procedure, independent of parents or legal guardians, in a parental consent statute like the one in Louisiana. Plainly, the State has attempted to enter through the proverbial back door by suggesting that the "best-interest-of-the-minor" inquiry cannot arbitrarily exclude the input of parents or a legal guardian. Although the Supreme Court has recognized that bypass decisonmakers can consider whether parental notification would be in the

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must be completed, 89a-91a; and (3) violated the minor's right to make an abortion decision anonymously and confidentially by authorizing the state court to notify the girl's parents that she sought a judicial bypass, 91a-92a.

> best interest of the minor, *Bellotti II*, 443 U.S. at 640, 99 S. Ct. at 3046-47, and that complete anonymity is not required, [*Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990) (*Akron II*)], the Court has *not* held that anonymity may give way to parental notification in bypass statutes.

36a.

In response to the court of appeals' decision, the Louisiana Legislature enacted further amendments to the parental consent law in 1997. 107a-113a ("1997 Amendments"). The 1997 Amendments changed the "may" language back to "shall," curing the impermissible delegation of discretion to bypass judges. 110a. The 1997 Amendments also remedied the expediency problems of the 1995 Amendments by setting forth specific time periods within which the court must rule on a minor's application and within which counseling and evaluation reports must be filed with the court. 108a-111a. With respect to the parental notification provision, however, the legislature made no change from the language of the 1995 Amendments, explicitly noting its "intention . . . to preserve the language of R.S. 40:1299.35.5 (B)(5) for appeal to the United States Supreme Court of [*Causeway Medical Suite v. Ieyoub*]." 113a.

Subsequent to the passage of the 1997 Amendments, the parties entered into a stipulation, filed with the court of appeals, that "the Court may enter an order enjoining enforcement of the Parental Notification Provision, as amended by the 1997 Amendments, (La. R.S. 40:1299.35.5(B)(5)), until such time, if ever, as the permanent injunction entered in this case against enforcement of the Parental Notification Provision, as amended by Act 1254, is reversed or vacated." The stipulation expressed the parties' understanding that any further judicial review in this case would involve

consideration of Louisiana's parental consent law as amended by the 1997 Amendments. *See Tully v. Mobile Oil Corp.*, 455 U.S. 245, 247 (1982) ("The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision."). *See also Fusari v. Steinberg*, 419 U.S. 379, 387 (1975) (Supreme Court must review lower court decision in light of existing law, not the law in effect at time judgment was rendered); *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (same); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (same); *United States v. Alabama*, 362 U.S. 602, 604 (1960) (same).

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied because the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. First, the decision of the court below is not "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a); nor did the court below decide "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Further, no important question of federal law is raised by this case that has not been, but should be settled by the Court. *Id.* Accordingly, the petition should be denied.

I. QUESTION ONE OF THE PETITION ESTABLISHES NONE OF THE FACTORS WEIGHING IN FAVOR OF A GRANT OF CERTIORARI.

The lower court's ruling on the merits of this case fully accords with the controlling parental involvement decisions of this Court and the courts of appeals. Accordingly, question one of the petition does not provide a basis for this Court's grant of certiorari.

This Court has repeatedly held that while states may attempt to require young women to obtain the consent of

their parents in a decision to terminate a pregnancy, parental consent cannot be mandated in every circumstance. Rather, abortion laws mandating parental consent must contain an alternative method by which the young woman can seek authorization for the abortion without parental involvement. *Bellotti II*, 443 U.S. at 643. *See also Lambert v. Wicklund*, 117 S. Ct. 1169, 1171 (1997). This alternative bypass procedure is necessary to ensure the privacy rights of all young women, including young women who cannot seek parental consent for abortion. *See Bellotti II*, 443 U.S. at 642-43. Such young women include those in abusive families, who are entitled to avoid parental involvement completely. *See Hodgson v. Minnesota*, 497 U.S. 417, 460 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) (condemning Minnesota abuse exception as "in reality, a means of notifying the parents"). Without such a bypass, a parental consent law would delegate unconstitutional "veto power" over a young woman's abortion decision to her parent or guardian. *See Bellotti II*, 443 U.S. at 644.

The alternative bypass procedure in a constitutional parental consent law must meet four criteria, established in *Bellotti II* and applied consistently in all this Court's subsequent cases. The procedure must:

> (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well informed enough to make the abortion decision independently; (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (iii) ensure the minor's anonymity; and (iv) provide for expeditious bypass procedures.

Lambert, 117 S. Ct. at 1171 (setting forth principles established in *Bellotti II*). *See also Planned Parenthood v.*

Casey, 505 U.S. 833, 899 (1992); *Akron II*, 497 U.S. at 511-514.

The anonymity required of the bypass procedure is designed to protect both the young woman's interest in avoiding parental involvement and her broader interest in avoiding disclosure of intensely private information to the public. *See Akron II*, 497 U.S. at 513 (bypass must "take[] reasonable steps to prevent the public from learning of the minor's identity"); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (right of privacy includes "the individual interest in avoiding disclosure of personal matters").

In particular, *Bellotti II* explicitly requires that if a court finds that the minor is mature or that the abortion is in her best interests, the court must authorize the abortion without requiring *any* parental involvement. *Bellotti II*, 443 U.S. at 647-48 (if the minor is mature, "the court must authorize her to act without parental consultation or consent"; and if the abortion is in the immature minor's best interests, "she is entitled to court authorization without any parental involvement"). Indeed, one of the chief reasons this Court invalidated the Massachusetts parental consent law in *Bellotti II* was because the Massachusetts Supreme Judicial Court had construed the statute as requiring parental involvement. *Bellotti II*, 443 U.S. at 646-47 ("an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion") (footnote omitted). Furthermore, the bypass mechanism in any parental involvement statute must not itself give notice to the minor's parents. *Hodgson*, 497 U.S. at 460 (O'Connor, J., concurring) (Minnesota's statutory "bypass" for abused and neglected minors inadequate because it could result in notice to parents); *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 441 n.31 (1983) (*Akron I*).

In contravention of both *Hodgson* and *Bellotti II*, Louisiana's parental consent law permits a juvenile court

judge to breach a young woman's confidentiality by notifying both her parents, against her will, that she is pregnant and seeking an abortion. La. Rev. Stat. Ann. § 40:1299.35.5(B)(5) ("If the court finds that it is in the minor's best interest to notify her parents or guardian, the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor.").[3] This statute conflicts with the anonymity requirement of this Court's prior decisions in at least four significant ways.

First, it denies all minors, including mature minors, access to a judicial bypass proceeding that ensures confidentiality vis-a-vis the minor's parents or guardian. *Bellotti II*, 443 U.S. at 647-48. Because a minor cannot be certain prior to the bypass proceeding that the court will find that she is mature and that notification is not in her best interest, every minor risks the possibility that the court will initiate parental notification with respect to her bypass application. Unlike any other parental involvement requirement previously addressed by this Court, Louisiana's statute directs a bypass judge who has found parental notification to be in an immature minor's best interest not to deny the minor's application, but to undertake the notification of both the minor's parents,[4] regardless of her

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[3] Because this provision *requires* the judge to breach the minor's confidentiality in direct contravention of the *Bellotti II* standards, the Court cannot presume that the 1997 Amendments will be applied constitutionally. *See Akron I*, 462 U.S. at 441 (finding that Akron parental consent ordinance was not "reasonably susceptible of being construed to [comport with *Bellotti II*]").

[4] There can be no doubt that the statute requires notification by the state court of both parents, for it uses the plural term "parents" in prescribing notification, while using the singular "mother or father" in its alternative of parental consent. *Compare* La. Rev. Stat. § 40:1299.35.5 (B)(5) *with* La. Rev. Stat. § 40:1299.35.5 (A)(1). Under Louisiana law, the use of

wishes.[5] La. Rev. Stat. § 40:1299.35.5(B)(5). The statute contains no exception to this requirement for minors who live with one custodial parent. *Id.* The judge must carry out this notification prior to determining whether an abortion is in the minor's best interest and prior to any appeal. *Id.* Thus, even a minor later held to be mature by a Louisiana court of appeals faces compelled two-parent notification based on an erroneous trial court finding that she is immature. This risk of parental notification by the court will undoubtedly deter some minors, both mature and immature, from seeking an abortion.[6] As Justice O'Connor explicitly recognized in her controlling opinion in *Hodgson v. Minnesota*, 497 U.S. at 460, a proposed bypass mechanism "is less than effectual" when that mechanism itself provides notice to the minor's parents. (O'Connor, J., concurring) (striking down a two-parent notification requirement and holding inadequate that statute's "abuse exception" which would have resulted in notice to the minor's parents).

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two different words in the same statute demonstrates the legislature's intent to assign different meanings. *Opdenwyer v. Brown*, 99 So. 482, 484 (La. 1924) ("[W]e cannot assume that when [the authors of our Code] said two different things, nevertheless they meant only one and the same"). *Cf. State v. Muller*, 365 So. 2d 464, 466 (La. 1978) (where new statute is worded differently from preceding statute, legislature is presumed to have intended to change the law). The statute also dictates that the court *shall* notify the minor's parents. The legislature's 1995 and 1997 changes from "shall" to "may," and then back to "shall" in response to this lawsuit, indicate the legislature's understanding that the term shall precludes any trial court discretion not to notify the minor's parents or to only notify one of those parents.

[5] A minor may, for example, wish at that point to involve only her custodial parent in the bypass proceedings, or to carry the pregnancy to term without informing either or both of her parents, or to travel to a jurisdiction that does not require parental involvement.

[6] Petitioners' assertion that the parental notice provision only affects *immature* minors, *see e.g.*, Pet. 8, 10, simply ignores the deterrent effect that the *risk* of notification would have on young women who are ultimately found to be mature.

Second, not only does Louisiana's parental notice provision run afoul of *Bellotti II's* anonymity requirement and Justice O'Connor's opinion in *Hodgson,* it is not justified by any legitimate state interest. As the *Hodgson* Court recognized, the state has no interest in forcing the minor and *both* her parents -- one of whom may well be an estranged, non-custodial parent or an abuser of the child or the other parent -- to communicate with one another about the abortion decision. *Hodgson*, 497 U.S. at 450-51 (opinion of the Court). The *Hodgson* Court found that in "the ideal family setting," the state "has no legitimate interest" in requiring notice to both parents because it may not "question[] one parent's judgment that notice to the other parent would not assist the minor or . . . presume[] that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child." *Id.* at 450. With respect to dysfunctional families, the Court held that the two-parent notification requirement not only failed to serve any state interest, it actually "disserve[d] the state interest in protecting and assisting the minor." *Id. See also id.* at 459 (O'Connor, J., concurring) (agreeing with Court's opinion "that Minnesota has offered no sufficient justification for its interference with the family's decisionmaking processes"); *id.* at 460 ("Given its broad sweep and its failure to serve the purposes asserted by the state in too many cases, I join the Court's striking of [Minnesota's two-parent notification requirement without a bypass"). Yet Louisiana's parental consent requirement requires that the court notify *both* parents, despite the fact that only one of them must consent to the minor's abortion, and regardless of the minor's family circumstances. La. Rev. Stat. §§ 40:1299.35 (A)(1), (B)(5). Such two-parent notification "substitut[es the state's] conception of family life for the family's own view," and is unconstitutional. *Hodgson*, 497 U.S. at 452.

Third, Louisiana's parental consent law violates the right of privacy of immature minors by permitting a minor's

parents or guardian to participate in the bypass decisionmaker's determination of whether an abortion is in the minor's best interest. Under *Bellotti II*, an immature minor is entitled to an *independent* determination by the bypass decisionmaker of whether an abortion is in her best interest. *Bellotti II*, 443 U.S. at 647-48. If the bypass decisionmaker finds that the abortion is in the minor's best interest, the minor must be permitted to obtain the abortion without any parental involvement. *Id.* Moreover, the state has no legitimate interest in requiring *both* of the minor's parents to participate together in the decision of whether the minor's best interests would be served by seeking an abortion. *Hodgson*, 497 U.S. at 450-51. Indeed, such a requirement violates a single parent's right to avoid contact and communication with a non-custodial spouse. *Hodgson*, 497 U.S. at 451.

Finally, Louisiana's parental consent law further violates the right of privacy of immature minors with respect to whom the court would have made a best interest finding prior to parental involvement, but does not so find after parental consultation. Under Louisiana's parental consent law, a bypass court must ask whether parental notification is in an immature minor's best interest *before* determining whether an abortion is in the minor's best interest. A parental involvement statute, however, cannot pass constitutional muster if it places the "notification-in-best-interest" question ahead of and apart from the "abortion-in-best-interest" question. *See Bellotti II*, 443 U.S. at 648 (if court determines that abortion is in best interest of immature minor, "she is entitled to court authorization without any parental involvement"). *Cf. Lambert*, 117 S. Ct. at 1172 (parental notice statute upheld where it did not "permit[] a court to separate the question whether parental notification is not in a minor's best interest from an inquiry into whether abortion

(without notification) is in the minor's best interest").[7] Accordingly, the court of appeals correctly held that the bypass procedure in Louisiana's parental consent law fails to comply with the standards set forth in this Court's prior parental involvement decisions.

In an effort to avoid *Bellotti II*'s clear requirement of anonymity, the petitioners incorrectly claim that *Bellotti II* authorizes a bypass court to notify the parent or guardian of an immature minor who has applied for a judicial bypass. *See* Pet. 8, 11, 21.[8] Petitioners' faulty conclusion is based upon a misreading of the following portion of *Bellotti II*:

> [T]he court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required.

Bellotti II, 443 U.S. at 648 (footnote omitted). As the court of appeals correctly found, 35a-36a, however, this language stands for the proposition that a court *need not immediately deny* the bypass application of an immature minor as to

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[7] Petitioners incorrectly contend that Louisiana's parental consent law requires notification only with respect to "*immature* minors for whom it is not apparent that the abortion would be in her best interest." Pet. 17 (emphasis in original). Under the plain language of that statute, however, if notice is in an immature minor's best interest, the bypass court cannot reach the "abortion-in-best-interest" question until after notifying the young woman's parents. La. Rev. Stat. 40:1299.35.5 (B)(5).

[8] Petitioners also assert that "[t]his Court's pronouncements on anonymity do not create a constitutional right for immature minors to avoid the guidance of their parents." Pet. 18. In fact, however, *Bellotti II* makes clear that, at a minimum, an immature young woman has a right to obtain an abortion without any parental involvement if an abortion is in her best interest. *Bellotti II*, 443 U.S. at 647-48.

whom the court believes an abortion would, under the relevant circumstances, not be in the minor's best interest. *See Bellotti II*, 443 U.S. at 648. Instead of denying the application in those circumstances, the court may defer resolution of the application until the minor, *by her own choice and of her own accord,* notifies her parents of her pregnancy and involves them in the authorization process. *Id.* Thus, the quoted language addresses parental consultation that takes place *after* the court's maturity and best interest findings are made and *only if* authorization for an abortion is not warranted by those findings. As the court of appeals held:

> [T]his language from *Bellotti II* in no way permits the independent bypass decisionmaker to contact a minor's parents, inform them that their minor daughter is seeking an abortion without their consent, and then ask the parents to participate in the process of deciding whether the abortion would be in the minor's best interest.

35a. Petitioners' interpretation of the quoted language would completely eviscerate the rule of anonymity established in *Bellotti II*.[9]

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[9] In a futile attempt to argue that Louisiana's parental consent law somehow meets *Bellotti II*'s anonymity requirement, Pet. 20-22, petitioners also misread the statement in *Bellotti II*, 443 U.S. at 648, that "the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court." Although the Court clearly used the term "initial" to refer to the minor's access to the a bypass proceeding *prior to resort to her parents*, *see id* at 647-48, petitioners erroneously rely upon this language to argue that *Bellotti II*'s anonymity requirement is limited only to the minor's *first step* in pursuing judicial authorization for an abortion, *see* Pet. 21. Petitioner's interpretation finds no support in *Bellotti II* and ignores the fact that if a minor's anonymity is threatened at *any* stage of the bypass procedure, her willingness and freedom to gain *initial access* to that procedure will be hindered. Second, by misconstruing the term "public" in *Akron II*, 497 U.S. at 513, petitioners erroneously rely on that case for the proposition

Equally unpersuasive is petitioners' attempt to sidestep the constitutional infirmities of Louisiana's parental consent law by claiming that this case involves parental notice rather than consent, and that parental notice laws need not contain a *Bellotti II* -type bypass. *See, e.g.*, Pet. 12-13 (citing *H.L. v. Matheson*, 450 U.S. 398 (1981)), 16, 18 (citing *Hodgson*, 497 U.S. 417). Unlike *Hodgson* and *Matheson*, this case addresses a parental *consent* law, not simply a requirement of parental notice. As such, it must meet the requirements of *Bellotti II*. *See Bellotti II*, 443 U.S. at 648 (discussing the "full extent" of parental involvement permitted in connection with consent statutes).[10] Petitioners' implication that a

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that anonymity need be maintained only as to the public, and, thus, not as to a minor's parents. Pet. 22. As the Court's discussion in *Akron II* makes clear, the Court utilized that word not to distinguish between persons known and unknown to the minor, but between persons responsible for the internal administration of the courts and all other persons, including the minor's parents.

[10] Even if Louisiana's parental consent law were construed as a notification requirement, it would not survive constitutional scrutiny. Although this Court has left open the question of whether a parental notification law requires a *Bellotti II* -type bypass, *Akron II*, 497 U.S. at 510, Justice O'Connor's controlling opinion in *Hodgson* recognized that a proposed "bypass mechanism" that might itself cause parental notice is impermissible even in the parental notification context. *Hodgson*, 497 U.S. at 460 (O'Connor, J., concurring) (rejecting suggestion that abuse and neglect exception provided adequate protection for minors who did not want to notify their parents). *See also Planned Parenthood v. Miller*, 63 F.3d 1452, 1460-63 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996) (rejecting contention that abuse and neglect exception could provide adequate protection for minors seeking to avoid parental notification). This Court has also properly recognized, with respect to married women, that husband notification and husband consent are essentially equivalent. *Casey*, 505 U.S. at 897. Moreover, the federal courts have repeatedly invalidated parental notification requirements that do not contain an anonymous, expeditious bypass procedure permitting a mature minor or a minor for whom an abortion is in her best interest to obtain an abortion without any parental involvement. *Miller*, 63 F.3d at 1460 ("parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass"); *Glick v. McKay*, 937

consent requirement need not meet the *Bellotti II* requirements if it *also* contains a notification requirement is absurd.

Because the decision of the court below correctly applies the controlling standards set forth in *Bellotti II* and its progeny, it neither creates a conflict with the decisions of this Court or the courts of appeals nor presents an important question of federal law that has not been, but should be, addressed by this Court. Sup. Ct. R. 10 (a), (c).[11] Accordingly, the petition should be denied.

F.2d 434 (9th Cir. 1991) (applying the same standards applicable to a judicial bypass for a parental consent statute to strike down a Nevada parental notice law); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983) (construing Supreme Court precedent to require "that states provide bypass procedures in connection with both consent and notification statutes"). *See also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985) (the *Bellotti II* standard "also governs provisions requiring parental notification"), *aff'd by an equally divided Court*, 484 U.S. 171 (1987); *Women's Community Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 546-48 (D. Me. 1979) (issuing preliminary injunction against enforcement of Maine parental notification statute because "it fails to meet the constitutional standard defined in Mr. Justice Powell's opinion" in *Bellotti II*); 75 Op. Atty. Gen. Md. 14, 1990 Md. AG LEXIS 46, at *22 (Aug. 30, 1990) (concluding, in wake of *Akron II*, that "Until the Supreme Court clearly enunciates a new rule of law, we must continue to rely on existing precedent indicating that any parental notice requirement must include a bypass procedure meeting the standards of *Bellotti v. Baird*."). *See also Lambert*, 117 S. Ct. at 1172 (upholding parental notification requirement on the grounds that properly construed, its bypass met the guidelines of *Bellotti II*). *Cf. Matheson*, 450 U.S. at 407 (ruling that requirement of parental notice "if possible" did not violate rights of an immature minor who "made no claim or showing as to her maturity or as to her relations with her parents").

[11] Petitioners contend that "the only issue to which this Court's prior decisions do not speak is whether the notification of an immature minor's parents can be effected by the judge who must determine whether the abortion is in the immature minor's best interest rather than by a physician as in traditional parental notification statutes." Pet. 10. As explained, *supra* at 8-11, that question is disposed of by *Bellotti II* and

II. QUESTIONS TWO, THREE AND FOUR OF THE PETITION PROVIDE NO BASIS FOR THIS COURT'S REVIEW.

A. The Shall/May Issue Decided by the Courts Below has Become Moot.

Question two of the petition seeks review of the shall/may issue decided by the courts below. Because the 1995 Amendments provided that judges "may," rather than "shall," grant bypass applications that satisfy the criteria established in *Bellotti II*, the lower courts correctly determined that such a grant of discretion violated the constitutional requirements articulated in *Bellotti II*. 20a-30a; 87a-89a. Subsequent to the court of appeals' ruling in the case, however, the Louisiana Legislature passed the 1997 Amendments which replaced the discretionary term "may" with the mandatory "shall," rendering moot the shall/may question raised below. Because that issue is moot, it does not present a question appropriate for this Court's certiorari review. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 710 (7th ed. 1993) ("If the controversy becomes academic by reason of changed circumstances, the Court's jurisdiction ceases and the case becomes moot."); *United States Dep't of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (law passed during the pendency of the litigation mooted the question of statutory interpretation as to which certiorari was granted because no matter how the Court decided the issue,

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Hodgson. But, even if that question had not yet been answered, this case would not provide the Court with an appropriate opportunity to address it because Louisiana's parental consent law presents a number of other infirmities which clearly require its invalidation under existing law. Thus, petitioners' question would improperly seek a constitutional determination unnecessary to resolution of the case. *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

its decision would not have affected the rights of the parties); *Diffenderfer*, 404 U.S. at 414 (appeal was moot where a law passed during the pendency of the litigation repealed the statute at issue and replaced it with scheme that at least limited, if not eradicated, the statutory application challenged); *State of Nevada v. Watkins*, 943 F.2d 1080 (9th Cir. 1991) (legislative action rendered state's petition moot).[12]

Although they concede that "the 'may' and 'shall' *language* issue is now moot with the enactment of Senate Bill 1558 of 1997," Pet. 23 (emphasis in original), petitioners still seek a ruling from this Court on whether the kind of discretion granted by the 1995 Amendments *would have been* constitutional. *Id.* The petitioners' desire for an advisory opinion, however, provides no basis for granting certiorari. *Diffenderfer*, 404 U.S. at 414 (where statute passed during pendency of suit repealed statute at issue, the case had "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law").

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[12] Thus, this is not a case like *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977), where the state's revision of a challenged law "was made only for the purpose of interim compliance" with a lower court order. *See also Zablocki v. Redhail*, 434 U.S. 374, 382 n.9 (1978) (no mootness where change in law was contingent upon courts' ruling on prior laws); *Beare v. Briscoe*, 498 F.2d 244, 245 n.5 (5th Cir. 1974) (same). In this case, the Louisiana Legislature has unconditionally acted to remedy the shall/may and expediency issues rather than seek further appellate review of those matters. 113a (" [T]he purpose of this Act is to remedy the issues addressed by [the Fifth Circuit's decision in this case] . . . with the exception of the [parental notice provision] issue . . . . [I]t is the intention of the legislature in this Act to preserve the [parental notice provision issue] for appeal to the United States Supreme Court . . . ").

B. Jurisdiction of the Lower Courts Over this Case is Well Established Under Existing Law.

Petitioners' argument in question three that this Court and the courts below lack Article III jurisdiction over this controversy also lacks merit. Whether petitioners have authority to control Louisiana state court procedures is irrelevant to the issue before the Court. Respondents do not seek an injunction against family court operations. Rather, they seek an injunction against enforcement of La. Rev. Stat. Ann. § 40:1299.35.5, the Louisiana statute that criminalizes the provision of abortion services to young women in certain circumstances. Clearly, the Governor and the Attorney General of the State of Louisiana have authority to enforce Louisiana's criminal laws and can therefore be enjoined from doing so. *See* La. Const. Art 4, § 8 (Attorney General is responsible for enforcing Louisiana laws); La. Const. Art 4, § 5(A) (Governor has legal duty to ensure that the laws of the state are faithfully executed); *Ex parte Young*, 209 U.S. 123 (1908) (state officials who have the power to enforce unconstitutional state laws may be enjoined from enforcing them). Accordingly, the lower court correctly concluded on the basis of existing law that this case presents a justiciable controversy.

C. Question Four of the Petition was Not Decided by the Courts Below.

Petitioners' fourth question improperly invites this Court to undertake a wholesale review of its entire body of abortion jurisprudence, the vast majority of which was not considered in the decisions below. As discussed in Section I, *supra*, this case is governed by discrete and well-established precedents that govern parental involvement laws. It is difficult, if not impossible, to imagine how this case, which requires no new interpretation or expansion of established constitutional principles, could present the Court with an appropriate opportunity for delving into the very basis and scope of a

woman's right to choose an abortion. At a minimum, because these issues were not ruled on by the courts below, they provide no basis for the grant of certiorari. Sup. Ct. R. 10 (c). [13]

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[13] Petitioners have not sought review of the *Salerno/Casey* question addressed in a number of lower federal court decisions. *See Casey*, 505 U.S. at 895 (suggesting that an abortion law is facially invalid if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); *United States v. Salerno*, 481 U.S. 739, 745 (1987) (in a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid"). *Compare, e.g., Miller*, 63 F.3d at 1456-58 (*Casey* standard displaced *Salerno* standard for facial challenges); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (rejecting applicability of *Salerno), cert. denied*, 117 S. Ct. 2453 (1997); *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (on remand) (the Supreme Court "set a new standard for facial challenges to pre-viability abortion laws"); *Women's Medical Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1062 (S.D. Ohio 1995) ("this Court declines to apply *Salerno* to the challenged [abortion] regulations in this case"), *appeal docketed*, Nos. 96-3157 & 96-3159 (6th Cir. Feb. 8, 1996); *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1447-48 (S.D. Ind. 1995) ("this court believes that *Casey* effectively displaced *Salerno*'s application to abortion laws"), *appeal stayed*, No. 95-3965 (7th Cir. Jan 22, 1996), *with Barnes v. Moore*, 970 F.2d 12, 14, n.2 (5th Cir.), *cert. denied*, 506 U.S. 1021 (1992) (*Casey* did not overrule *Salerno*). As both of the lower courts correctly held, resolution of the *Salerno/Casey* issue is not necessary to disposition of this case. 15a; 85a n.2. Louisiana's parental consent law fails to pass constitutional muster even under the stricter *Salerno* standard for the challenged statute denies *all* minors seeking a court bypass access to an anonymous and independent bypass procedure. *See supra* at 8-9. Thus, it does not present a clear case for resolution of this question. *See Janklow v. Planned Parenthood*, 116 S. Ct. 1582, 1583 (1996) (Stevens, J., respecting denial of certiorari).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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